

NOT FOR PUBLICATION - For Upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

United States of America,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 84-104
)	
Government of the Virgin Islands,)	
)	
Defendant.)	
)	

APPEARANCES :

Donald G. Frankel, Esq.
U.S. Department of Justice
Washington, D.C.
For the plaintiff,

Michael Law, Esq.
Assistant Attorney General
St. Croix, U.S.V.I.
For the defendant.

MEMORANDUM

I. Introduction

On Thursday, October 26, 2000, the Court conducted yet another hearing in the continuing saga of forcing the Department of Public Works ["DPW"] to bring the deteriorated sewage treatment facilities on St. Croix into compliance with this Court's amended consent decree and later orders setting deadlines for ending the spewing of millions of gallons of raw sewage into Christiansted harbor and the Caribbean Sea. In addition to obtaining the usual update on the current operational status of the St. Croix equipment and waste water sites, the Court summoned

officials from various departments of the Government of the Virgin Islands ["Government"] to explain why the Government continues to be incapable of complying with the terms it agreed to in the consent decree or with the deadlines the Court set after full consultation and agreement from DPW.

II. Status of St. Croix Sites

The Court addresses the status of the St. Croix sites first:

- A. LBJ Pump Station** continues to be operational. DPW has fabricated a battery box and has ordered a fuel tank to replace the one borrowed from GEC. The fuel tank should arrive within six weeks after the supplier receives payment, which according to the Government should have gone out the week of October 31st-November 3rd.
- B. Figtree Pump Station** is operational. Upon the initiative of Mr. Joseph Bradford, Utilities Director for DPW in St. Croix, and with the help of an electrical contractor, DPW used the starter from the non-working Pump No. 1 to bring Pump No. 3 on-line by October 6th, ending the six-week-long bypass of raw sewage from the Figtree station into the sea. Although Mr. Bradford conceived of this solution in early September, he could not try it out until early October

due largely to the \$40,000.00 the Government owed to the electrical contractor for previous work done. Once the Government paid the past-due balance, the temporary fix was easily accomplished and the sewage was sent through the system rather than into the ocean.¹ Yet again, massive quantities of raw sewage - some 56 million gallons over four weeks! (28 days at 2 million gallons a day) - had been discharged into the sea because the Government took more than a month to come up with a relatively insignificant amount of money. DPW has received the needed controller panel or board for Pump No. 2, which operates with the new part and can be brought on-line in a matter of minutes. Pump No. 3 continues to run from power diverted from Pump No. 1. What follows is a more detailed account of the status of Figtree.

1. Pump No. 2 is now repaired and ready to be put in operation at a moment's notice; Pump No. 3 still awaits a "gate card" (also called a "controller panel"), which has been ordered and is due to arrive on island within ten weeks; and Pump No. 1

¹ No electrical contractor other than Triumpho was willing to do business with the Government of the Virgin Islands.

needs to be replaced in its entirety.

2. The 6" diversionary pump is now in place and ready to be put into operation if Pumps Nos. 2 and 3 should fail.² Thus, if all three of the primary pumps at Figtree should fail or need to be repaired at the same time, the flow of sewage coming into Figtree can now be shunted around the station and on to the Aguilla Waste Water Treatment Plant, without any bypassing of effluent into the sea.
3. DPW has ordered the eight valves needed to replace the deteriorated isolation valves, which are due to arrive within ten weeks. Once on island, these eight replacement valves, plus the two new isolation valves already on site, should be installed within four weeks. Since installation of the valves will require the total shutdown of

² The 6" pump arrived on island sometime around September 14, 2000. There was a two-week delay while DPW waited for a "saddle valve" or joint, and then another delay due to the fact that the Government was in arrears with GEC, the contractor hired to install the pump. Before GEC would install the pump, it demanded payment from the Government for prior contract work for which it had not been paid. GEC was paid these past-due amounts sometime before October 6th, GEC was diverted on October 12th to repair the broken force main at LBJ, and, finally, began installing the new saddle valve on October 17th, only to find that it leaked due to a missing plug valve, which had been mistakenly shipped to Tortola. The pump was finally installed on October 24, 2000, two days before the hearing and a full six weeks after its arrival on island.

the Figtree Pump Station, the 6" pump will shunt the sewage around the station to the treatment plant.

C. Waste Water Treatment Plant: From September 6th until the evening before the hearing, October 25th, neither the south nor the north clarifier operated, meaning that for another seven weeks after the Court's September 6th order, the Waste Water Treatment Plant did not perform its function and dumped untreated effluent into the sea.

1. On October 25th, the North Clarifier went into operation after DPW discovered that the broken cable did not need to be replaced after all. (DPW had been waiting for a new cable since the date of the last hearing, and did not expect it to arrive for another six weeks.) According to Mr. Bradford, the North Clarifier is capable of handling the full flow at the Waste Water Treatment Plant, which he estimates is around 2.5 million gallons per day.
2. As of the date of the hearing, sludge in the South Clarifier still needed to be cleaned out. DPW represented to the Court that the South Clarifier

should be working as of the week of October 31st-November 3rd.

3. The septage receiver is operational, though its pump clogs frequently. The receiver requires vacuuming on a regular basis, now handled by GEC. DPW intends to have GEC add an agitator to the receiver and is also considering acquiring a different kind of pump that will better handle the solid waste that now clogs the pump.
4. The grit channels have been in operation since October 4th.
5. Thus far, the Government has not completed negotiations to hire a contractor to operate the waste water treatment plant. The original evaluation team was disbanded for unknown reasons, and a new team is currently negotiating for a contractor to operate the plants on both St. Thomas and St. Croix. The Government expects the contract to be in place within two months and the contractor to be in place thirty days later.

III. Discussion

The Department of Public Works has come a good way since the Court became actively engaged in supervising the repair,

maintenance, and operation of the St. Croix waste water treatment facilities upon the emergency motion of the United States, acting through its Environmental Protection Agency ["EPA"]. For the first time in many months, the sewage treatment facilities on St. Croix are functioning for the most part. It appears, however, that this improvement is due not to any institutional sense of urgency, but rather to the desire to avoid or delay the imposition of judicial sanctions. Even now, the St. Croix waste water treatment system is only marginally functional and continues to teeter on the edge of collapse as a result of inadequate attention from successive government administrations. The chronic and persistent lack of money to adequately staff, manage, or maintain the facilities, together with the impenetrable bureaucratic red tape and delay with which this Government has cocooned itself, directly result from an almost criminal administrative neglect and inability to put the health needs of the Virgin Islands community in proper order of priority. This is most evident in the demonstrated inability of the Government to rouse itself to deal with system breakdowns or other emergencies calling for a quick response.

A. Background

An abbreviated history of this case may help explain the Court's conclusions. On March 21, 1984, more than sixteen and

one-half years ago, the Environmental Protection Agency filed this lawsuit on behalf of the United States. Roughly a year and one-half later, on September 27, 1985, the Government of the Virgin Islands agreed that it was in serious violation of the Clean Water Act and signed a consent decree promising to remedy the various violations by separately specified dates. The Government then promptly ignored virtually all of these promises and dates. This original version of the consent decree languished ignored and forgotten by both parties until 1991, when the EPA brought the Government's violations of the consent decree to the Court's attention by moving for enforcement and assessment of stipulated penalties for those violations. In 1996, after several court proceedings and much negotiation between the parties, the Court approved an amended consent decree whose avowed purpose was to avoid "prolonged litigation and to further the public interest." (See Amended Consent Decree at 2, filed January 21, 1996.) On July 19, 1999, the Court approved the creation of a Penalty Stipulation Trust Fund to pay for specific personnel services, equipment, and improvements and to be funded by a portion of the monetary penalties provided for in the consent decree.

During this same period, the U.S. Army Corps of Engineers administered several grants awarded by the EPA to the Government

for the rehabilitation of various sewage treatment facilities, including the sites currently subject to the Court's scrutiny. In September 1997, the Corps completed the project of substantially refurbishing the Aguilla Waste Water Treatment Plant. See U.S. Dept. of the Interior, *Audit Report: EPA Agency Grants, Department of Public Works, Government of the Virgin Islands* 11 (Rep. No. 00-I-696, Sept. 2000) ["Audit Report"]. By January 1999, the Corps had substantially completed the overhaul and repair of four pump stations on St. Croix, including the two large pump stations, LBJ and Figtree. See *id.*

Despite these accommodations, the Government failed to devote sufficient effort and resources to prevent the almost total breakdown of St. Croix's sewage system by the end of 1999. At that time, the LBJ and Figtree Pump Stations, in addition to various breaks in sewage mains, were spewing raw sewage into the Christiansted harbor and the Caribbean sea, and its waste water treatment plant was incapable of performing the rudimentary function of a primary treatment plant, which is to remove the solids and sludge. Last February, the EPA filed an emergency motion seeking the direct involvement of the Court. The EPA requested that the Court require DPW "to immediately cease the unlawful bypass of raw sewage into the Caribbean Sea" and "to immediately begin repairs at the St. Croix [Waste Water Treatment

Plant], which is almost completely nonoperational, and to immediately begin performing all effluent monitoring required for the plant." (See Pl.'s Emergency Mot., filed Feb. 7, 2000.)

On February 12, 2000, the Court accepted the dates suggested by DPW and ordered the Government to cease the bypassing by those dates and to make the necessary repairs to the St. Croix sewage treatment facilities.³ In addition, the Court ordered the Government to implement one of its original promises, made as part of its compliance with the Clean Water Act and contained in both the initial amended consent decrees - namely, to hire a private waste water management contractor to manage the St. Croix treatment plant until it could sustain its rudimentary primary treatment of St. Croix's sewage for six months without interruption. The Court also directed the Government to file weekly status reports of its progress and to notify the Court and the public of any new or continuing bypasses.

On March 7, 2000, Governor Charles W. Turnbull proclaimed a state of emergency, waiving the statutory requirement of advertisement and competitive bidding for contractors in order to "institute emergency procurement procedures to protect the public's health and welfare." Governor Turnbull further

³ This order and supporting memorandum may be found at the District Court web site at <http://www.vid.uscourts.gov>.

proclaimed:

The Commissioners of the Department of Public Works, Property and Procurement, Health, Finance, the Attorney General, and any other Department whose participation is required in connection with such procurement process are hereby directed to give their full assistance and cooperation to the Commissioner of Public Works and the Department of Public Works as they proceed to institute emergency procurement procedures.⁴

Since its February 12th order, the Court has been all too intimately involved with the week-to-week maintenance, repair, and operation St. Croix's waste water treatment system. As a result of many motions, resolutions, reports, promises, deadlines, and partial successes,⁵ the Government today is the closest it has ever been to full compliance on St. Croix. Yet, progress in forcing the Government to comply with the amended consent decree and this Court's subsequent orders has been slow, despite the threat of sanctions for contempt ranging from fines to imprisonment for the Government and its officials. The purpose of this most recent hearing was to uncover the source of

⁴ The emergency proclamation was to remain in effect for ninety days and could be renewed. Although the Governor did not formally renew the proclamation, all the government officials who testified at the hearing agreed that the affected agencies continued to treat sewage procurement requests under emergency procurement procedures.

⁵ For an illustration of the precarious nature of the successes thus far, one only need look to the recent rupture of a force main near LBJ Pump Station. Although DPW has succeeded in both repairing the LBJ Pump station and obtaining an appropriate back-up pump should the station fail, the successes are often undermined by surrounding weaknesses that emerge as overwhelming crises. On November 29th, a force main near the station ruptured due to deterioration of the pipes. Even with the back-up pump, it took DPW forty-two hours to stop the bypass.

DPW's inability to bring the Government into full compliance with the amended consent decree and this Court's orders.

B. The October 26th Hearing

With the goal of locating the source of these persistent delays and lack of funds, the Court summoned several Government officials to explain to the Court the various processes involved with procurement and contract negotiations. In general, the testimony revealed a late-blooming awareness on the part of the Government and its officials of the critical nature of waste water issues. Indeed, the Court was repeatedly assured that no particular administrative department, procedure, or funding mechanism prevents the progresses of procurement or contract negotiations. On the other hand, there was other testimony of continuing institutional resistance.

For example, delays occur when a contract has been set upon its course for approval without the proper accompanying documentation or when a contractor who has performed work without a formal written contract now demands payment. In both situations, the contract or request for payment meets with rejection and resistance as it is batted back and forth between disjointed departments, who each demand strict compliance with procedural requirements. The Environmental Engineer for the Department of Public Works, Mr. Jeff Watson, testified that in

the past months, several critical contracts languished at some mysterious point in the approval or payment process, including one contract that was not signed by the Governor for over one year.⁶ Finally, DPW comptroller Tiffany Moorehead testified that it was only due to her persistent efforts that the Government finally paid the contractors the past-due amounts that have held up needed repairs.

Despite the unsettling and somewhat conflicting versions of the efficiency of the procurement process, Mr. Ira Mills, the Director of the Office of Management and Budget, testified that there is sufficient money to bring the St. Croix facilities into compliance, and that his office has consistently set aside the appropriate funds. Similarly, the Commissioner of Finance, Ms. Bernice Turnbull, assured the Court that DPW's sewage-related contracts receive expedited handling on a first priority basis and that any delay in payment or processing is not the result of the Department of Finance or any failure of fast action on its part. Accordingly, the Court will accept no further excuse based

⁶ Curiously, the Governor signed three of these contracts on Friday, October 20th, the date originally set for this hearing. In defense of the governor's office, Mr. Keith Richards, assistant to the Governor for capital improvements and long-term planning, testified that, as far as he knew, the office did not receive these contracts until two or three weeks before the October 26th hearing.

upon a lack of funds for failure to comply with its orders.⁷

The Court cannot help but note the acceleration in activity and ingeniousness in the weeks right before this hearing. For example, Acting DPW Commissioner, Mr. Wayne Callwood, testified that he recognizes the inefficient nature of the process and the need for focused attention in order to truly "fast-track" a contract or other request through the system. To that end, he has developed a special task force to process DPW's high priority contracts and requests for payment. He has assigned new responsibilities to some employees and is prepared to hand-walk documents to the various Commissioners for approval. Commissioner Callwood is also working to establish a "foreseeable emergency fund" that will be easily accessible as a separate account within DPW and available in the event of an emergency. He plans to have this emergency fund in place by early next year. In light of this progress and improved attitude, the Court will reduce the frequency of reports from weekly to monthly, beginning December 29, 2000.⁸

⁷ Contrary to recent media reports, there is not \$17 million in federal grant money for repairs to the St. Croix facilities sitting unused in some account. The Government has in fact drawn down and spent all of the federal grant allocated for the St. Croix Waste Water Treatment Plant, with only \$9,703.00 available for St. Croix pump station rehabilitation as of September 30, 1999. See Audit Report, *supra*, at 11, 21.

⁸ The Court reminds the Government that all of its orders requiring continuing action, e.g., filing weekly reports, continue in full force and effect unless or until this Court specifically modifies them. The Government seems to be under the impression that a hearing somehow suspends earlier

IV. Conclusion

Although encouraged by the current status and avowed sense of urgency, the Court hopes that this heightened level of compliance is not merely the result of preparation for the hearing. The Court hopes instead that this recent activity at all levels results from a sense of real urgency, which should now fully permeate all the departments involved, not just DPW.

Finally, judicial oversight of a sewage treatment system is a time-consuming, inefficient, and unwieldy substitute for a competent and effective DPW that properly performs its duties pursuant to EPA's environmental regulations. The Court fully expects that, with Commissioner Callwood's guidance, DPW will be able to comply with the Court's amended consent decree and orders to protect the health and safety of the inhabitants of the Virgin Islands. The Court also expects to be out of the waste water treatment business very soon.

continuing obligations until a new order issues. For example, the Government has filed no weekly reports since its report filed October 30, 2000, which covered the period between October 8-14, 2000. Thus, if DPW fails to report monthly as required by the attached order, the weekly reporting requirement will be reinstated.

ENTERED this 13th day of December, 2000.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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DIVISION OF ST. THOMAS AND ST. JOHN

United States of America,)	
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Plaintiff,)	
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v.)	Civ. No. 84-104
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Government of the Virgin Islands,)	
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Defendant.)	
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APPEARANCES :

Donald G. Frankel, Esq.

U.S. Department of Justice, Washington, D.C.
For the plaintiff,

Michael Law, Esq.

Assistant Attorney General, St. Thomas, U.S.V.I.
For the defendant.

ORDER

For the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED

1. Waste Water Treatment Plant:

- a. DPW shall install an agitator in the septage receiver by January 15, 2001.
- b. DPW shall clean and make operational the South Clarifier by December 15, 2000.
- c. DPW shall notify the Court when the contract for the management of the plant is in place. Further, DPW shall notify the Court when the contractor is

mobilized under the terms of the contract. In no event shall the time spent on this process extend beyond February 15, 2001.

2. Figtree Pump Station:

- a. DPW shall notify the Court upon receipt of the gate card for Pump Number 3, and further shall notify the Court of any delay in the receipt and/or installation beyond that represented at the hearing.
- b. DPW shall provide the Court with a firm and detailed timetable for the purchase and installation of a new pump to replace Pump Number 1 by January 15, 2001. DPW shall notify the Court of any proposed deviations from this timetable, stating the reasons in detail.
- c. DPW shall notify the Court upon receipt of the eight replacement valves. Further, the valves shall be installed within four weeks of their arrival on island. DPW shall notify the Court of any delay in receiving the valves beyond that represented at the hearing.

3. LBJ Pump Station:

DPW shall immediately report to the Court the status of the payment to the supplier of the fuel tank. DPW shall further notify the Court upon receipt and installation of the tank, and of any delay beyond that represented at the hearing.

4. **Reporting**

Paragraph 5.a of the Court's Order dated February 12, 2000, is **MODIFIED** as follows:

a. Until such time as **(i)** all of the requirements or projects required by the Court's February 12th Order, as modified by this Order and the Court's September 6th Order, have been completed, and **(ii)** the contract operation for the management of the wastewater treatment plant has begun, DPW shall make monthly status reports, setting forth in detail all actions that have been taken during the month before to implement the requirements of the Court's orders. These monthly reports shall be filed with the Court beginning December 29, 2000, with copies to the Environmental Protection Agency ("EPA"), the Virgin Islands Department of Planning and Natural Resources, and the Court Monitor.

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ENTERED this 13th day of December, 2000.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
ORINN ARNOLD
Clerk of the Court

By: _____
Deputy Clerk

Copies to:
Honorable Geoffrey W. Barnard
Joycelyn Hewlett, Esq.
Asst. U.S. Attorney
St. Thomas, U.S.V.I.
Donald G. Frankel, Esq.
U.S. Dept. of Justice
VIA FACSIMILE
(617) 450-0448
Michael Law, Esq.
Asst. Attorney General,
St. Thomas, U.S.V.I.
Jennifer N. Coffin, Esq.